# AN ORGANIC CONCEPTION OF THE TREATY-MAKING POWER VS. STATE RIGHTS AS APPLICABLE TO THE UNITED STATES

## THE STATE

WHEN we talk of the State, its rights or its structures, we are necessarily led to the inquiry, "What do we mean by the State?" Beginning with the proposition that the State is a composite formed of individuals whose lives are shaped by the life of the whole, it necessarily follows that a perfect understanding of any particular State would involve a knowledge of the characteristics of the members who compose it. This of course is obviously impossible, but the theory underlying States generally is founded upon general human characteristics. So we may take as a basis the great truth discovered by Aristotle, that man is by nature a social and political animal and therefore a member of some State, however crude. Clearly, then, it is "apparent that the State is not to be considered as in any sense 'artificial,' or as a 'mechanism.' * * * The feelings that unite men into social and political units are as natural to them as are any of their individualistic impulses."[1] Having given the State, then, our inquiry into its meaning is concerned with its structure and growth as a social organism.

I. INTERNAL DEVELOPMENT OF THE STATE.—Broadly defined, the State is "an independent, organized Society."[2] Here let us consider the import of independence and organization of Society. We shall consider them in the inverse order; first, what is an organized Society?

In view of the fact that Society is an organism, including all the ties which in one way and another bind its members together, it may be said itself to be organized; and though Society necessarily incorporates the political element of its members, it is not until this political element manifests itself that Society can, in any real sense, be said to be organized; though after it has, all the bonds which go to make up the social body become as much a part of the then organized Society as the actual political ties, which together constitute the people a body politic. And the political element, as Aristotle has told us, is a creation of Nature in man. So at this point we find ourselves talking of the body politic itself as a purely natural creation—more or less perceptibly organized as the evolutionary

[1] The Nature of the State, W. W. Willoughby, p. 131.
[2] The State and the Individual, Wm. S. McKechnie, Ch. I, p. 44.

forces of nature have developed its resources and civilized its people. Here, then, when the political element in man's nature begins to exert itself, when we see Society taking on shape and form—organization, if you please—however crude, we see the first evidences of the State. Sir William Anson states practically the same theory when, in speaking of the State, he says, "We need not trouble ourselves with the shifting groups of men who form the lowest types of savage life; it is early enough to begin with the aggregates bound together by ties of real or supposed kinship and by common customs. And when these customs begin to be observed in deference to some other authority than the individual violence or general ill-will that arises from their breach, we are able to trace the first germs of the State. Whether it is a council of priests, or of elders, or an individual habitually exalted above the rest by his strength or his cunning, so soon as conduct is enforced by some sanction, the fear of some evil or hope of some good, however indeterminate or occasional, which is not the arbitrary will of the casual bystander, or the general inclination of the crowd, we see the humble beginnings of the State or Sovereign."[3] Here is an admirable statement of the transition from a mere Society into a State. When Anson says "it is enough to begin with the aggregates bound together by ties of real or supposed kinship and by common customs," of what is he speaking but Society, as nearly as it can be described apart from its government? A slight reference to government creeps in, and inevitably so, by his speaking of men being bound together by "common customs;" then again, when he says "and when these customs begin to be observed," is he not giving us an organized Society, presupposing the work of the individual as a political animal?

1. GOVERNMENT.—And what is this organization in Society after all, this outward manifestation of man's political nature, but government, more or less recognizable as such, as it is itself more or less complete and perfect? While the centralizing force of a people lies essentially in man's individual nature, it is not until we have gotten away from the idea of its being an individual possession and regard it as pervading the whole social organism that we can have any conception of government as a development of Nature.

Mr. Kelley observes "that government is in one sense no invention of man; for it is impossible to observe the habits of any animals or insects which live in communities without concluding that they are governed by an unwritten code, which increases in differentiation

[3] The Law and Custom of the Constitution, Sir Wm. Anson, Vol. I, p. 4.

according as the community itself is advanced in structure. So, if we examine the habits of a nest of ants, we shall conclude that they have a scheme of government more differentiated and better enforced than that of most of our savage races. The next fact that it seems pertinent to notice is that the code of unwritten rule which prevails in animal communities resembles that which prevails amongst savage races in the force which keeps this code alive; it is not the force of a king, or of courts of justice, or of police; it is force of habit."[4] This merely challenges attention to the fact that government is not necessarily the work of deliberation and intellectual effort, but may result from habit, or blind growth, except of course in so far as man, being himself a rational being, is necessarily conscious, to a greater or less extent, of what he does. Mr. Kelley goes on to say that "It is at the moment when this blind, unreflecting force of habit yields to deliberative, purposive conduct that savagery ends and civilization begins; for it is then that man parts company with the lower animals, and ceases to be unconsciously subservient to the natural instincts to which up to that time he had been blindly subject. * * * Human government is purposive, not merely instinctive. It is the result of intellectual effort engaged in making its own environment, and no longer the unconscious result of the environment furnished by Nature."[5] It might be well here to ask Mr. Kelley the question Mr. McKechnie asks in criticising Mr. Mill; "is it not possible that this human voluntary agency —this intellectual effort —is itself included in the whole which grows?"

Now, coming back to Anson, it is worth while to note that what Mr. Kelley would call involuntary deliberative government, or in other words government by habit, he calls government by custom, habit and custom being synonymous. "And when these customs," he says—or habits, if you will—"begin to be observed in deference to some other authority than the individual violence or general ill-will that arises from their breach, we are able to trace the first germs of the State." In other words, when conduct is enforced by some sanction, that conduct becomes law, and that sanction, when other than "the individual violence or general ill-will," is sovereign. Here, then, there is government, an expression of organized Society, without which no State could exist.[6] How evident it becomes, then, that government is essentially a development of nature, though it may, nay must, be to a greater or less extent, formed, influenced and developed through conscious, deliberate, human effort, which of course itself, advances by mere force of evolution.

[4] Government or Human Evolution, Kelley, Bk. III, Ch. I.
[5] Government or Human Evolution, p. 213.
[6] The State and the Individual, McKechnie, Ch. VII, p. 108.

We are still considering Society with regard to its organization; and, having arrived at government as a development of the social organism, attention is called to the fact that the theory of its so being is founded upon the existence of two things in Society—first, law and secondly, a sovereign.

A. LAW.—This law, as we have seen, need not necessarily be intelligible. On the other hand, it may be of ever so low a type, the habits of animals or customs of men; obedience to it may be blind, undeliberative and unconscious, responsive, merely, as a matter of Nature; but it is none the less law so far as being the basis of government is concerned. Were it not that we are attempting to show the evolution of the State from Nature, beginning with man at a stage little better than that of savagery and tracing his social relations through the various stages of his growth, it would be entirely superfluous to discuss the law of habit or custom, such as we find existing among animals, as forming the basis of the law upon which human institutions and governments are built. By so doing, however, we easily get away from any superstition that government is something peculiarly human, a creation of the will permeated by contract. It necessarily brings us to the conclusion that were man not a rational being, and not therefore a man, he would still be a subject of government, more or less like that of the lower animals. Government, then, in the most general sense, is not dependent on rationalism; but, when forming a part of the social relations of man, it does depend upon rationalism to the extent that the rational element pervades the animal personality—to this extent, and no further, can the conscious efforts of men shape and mould the government under which they live.

(a) *The Constitution.*—This law, which is at the basis of government, is not necessarily, then, of human creation, but may be the law of the ant hill, the bee-hive or the jungle, which, for a better name, we call instinct, or more correctly, since we do not know what it is, the law of Nature. But all law, as we well know, is not the law that orders battle among ants or declares slavery in the hive. When applied to the conduct of human affairs, that law incorporates the human element, and in that, of course, it is different from the law of instinct. The rational, deliberative element enters into it, which naturally gives rise to complications that are not found in the life of animals, and the greater the rational element, the higher the civilization, the more complex is the system under which a people live. "The more highly developed forms of animal organism," says Mr. McKechnie, "require a proper system of

organs, a series of nerves and muscles, and a skeleton. It is the same with highly developed states. They require a skeleton to keep the various members together."[7] And this skeleton is called a Constitution, nothing new, or introduced here for the first time to facilitate the argument; but a stage merely in the development of law in the social organism. There may be an attempt at penning it, as in our own country, or it may be allowed to find its only expression in habit and custom, as in England. It is comparatively easy, then, to see that introducing the idea of a Constitution at this point is no innovation, but an inevitable consequence of law being a part of man's evolution. Its development is out of the more inferior organization and concentration of law which precedes it, and of which it never ceases to be a part. It is this factor that makes a complete written Constitution impossible. A people's Constitution, in the broadest sense, cannot be comprehended within the construction of sentences and interpretation of words. It is infinitely too great to find an expression in language, however general or specific the terms used may be. The very problem that confronts any attempt to do so is, how far can the demand for generality, on the one hand, be encroached upon by the specification and detail necessary, on the other, to give the instrument practical value as far as possible in securing the end desired, without confining it to limits which have already been outgrown.

(b) *Interpretation of Written Constitutions.*—Once given the finished product, a written Constitution, it would seem that there was no chance for dispute or misunderstanding as to just what the law is; but how well we know such is not the case. Our own constitutional history affords a splendid illustration—the highest consummation of intellectual effort to embody in one instrument a people's law, and, at the same time, the most divergent views regarding its interpretation and construction. It is the inevitable consequence of human inability to supply an all sufficient code of laws, general enough to meet all contingencies, and specific enough to be capable of definite application. So a written Constitution with its advantages brings with it the question eternal, "what does this mean?"—a call for constant interpretation. And of what significance is this? None, perhaps, except as to the manner in which this interpretation is made, the subtle working up of that great body of unwritten law,[8] that under-current of public opinion fostered by

[7] The State and the Individual, McKechnie, Ch. V, p. 100.

[8] In Mormon Church *v.* U. S. (136 U. S. 1) Mr. Justice BRADLEY held, that limitations are in many instances not found in the Constitution but upon the fundamental principles upon which our government is founded.

custom and consciousness into the very life and spirit of language that was never intended to contain it. A Constitution incapable of growing itself will grow anyway by interpretation. Meanings are essentially put into it, in order to draw from it the proper implements with which to meet the infinite variety of contingencies that arise in a people's history. But this is not disparaging written Constitutions. In fact, it is this interpreting the set language, in the light of common justice and reason, that makes written Constitutions possible; and it is only when it is not done, and the strict letter of the law is enforced against the reason and spirit of it, that trouble arises. The extent to which this was the occasion for the rise of the two schools of thought respecting our own Constitution will be discussed further on.

A complete Constitution, if such a thing were possible, would provide for everything, all the various relations (international and domestic) that arise in the life of a people living under it. It would be "like a point in which all the laws are brought to a focus, —the concentrated essence of the legal system of a nation." But such a Constitution exists only in theory. "In practice, this small world of law is dependent on the great forces of life that rage around it. From these it draws its vitality, and it may be invaded or overthrown by violence from without. The law-ordered universe rests on rude forces which it cannot always chain. At any moment these may break through the forms of the law, and violently alter the structure of the Constitution. Any such forcible invasion of the sphere of law constitutes a revolution."[9] We shall have occasion, later on, to note a series of such revolutions, the result of which has been to change the United States from a mere band of States into a "banded State."

The question naturally arises here, What relation exists between the Constitution of a State and its government? Is it as Anson says, "the working machinery of the State?"[10] It is more correctly, perhaps, "a series of rules defining what that machinery shall be, The government does the work—it is the active agent, while the Constitution lays down the rules for its regulation. * * * The one represents the theory—the other practice."[11]

B. THE SOVEREIGN AND SOVEREIGNTY.—Reverting now to our previous consideration, that government is founded upon the existence of law and a Sovereign, and having traced the development

[9] The State and the Individual, McKechnie, p. 102.

[10] Law and Custom of the Constitution, Anson, Vol. I, p. 2.

[11] The State and the Individual, McKechnie, p. 104; The Nature of the State, W. W. Willoughby, p. 130.

of law from habit and custom into a positive and definite factor, the Constitution, it remains to direct our inquiry to this Sovereign. How does a Sovereign arise?

There is nothing peculiar in the mere fact that an absolute, unlimited, dominating force should exist in the conduct of human affairs more than in anything else in the universe—that is the order of things evidenced in all forms of life. But the character of this force and the manner in which it acts upon its subjects is shaped largely, if not entirely, by the life of a people living under it. Barbarism tends to promote the development of a few mighty personalities around whom the people gather as the best existing nucleus of their power. They set up their king, give him strength to overcome rebellion and to fix the political status of the individual in the community. "They establish the objective unity of the State. They bring the absolute sovereignty to objective realization."[12] The king *is* the State, and not until educating influences awaken the people to an understanding of themselves and a realization of their power is there any attempt to discriminate them. But refinement in ideas of government quicken into realities, the absolute monarch of yesterday is but the first servant of his people today. Men have developed a common consciousness, a will, that the despot must combat single-handed, they cease to fear out of mere superstition and to reverence for pure tradition's sake. The strongholds of tyranny are swept away, and, if open rebellion is not incensed by monarchical abuse and oppression, it will eventually come through the people's distrust in another doing for them what they are capable of doing for themselves. They seize upon the royal power, divest it of its sovereignty and retain only the office and the name, if they can be adjusted to the situation; otherwise they are dispensed with entirely. The State is no longer the king, but the people in sovereign organization;[13] hence the distinction between the State and its government.

In one sense the State may be regarded "outside of and supreme over the government," but "when we assign to it this separate and supreme position, we are, in greater or less degree, confounding the subjective with the objective state, the ideal with the actual state."[14] The State is perhaps properly regarded outside of and supreme over any particular *form* of government, for a State (without reference to any particular State) could exist without a monarchy, or without an aristocracy or without a democracy, but not without any one of

[12] Political Science and Constitutional Law, J. W. Burgess, Vol. I, p. 66.
[13] Political Science and Constitutional Law, J. W. Burgess, Vol. I, p. 66.
[14] Political Science and Constitutional Law, J. W. Burgess, Vol. I, p. 71.

them if we regard this classification as encompassing the entire field of government.[15] Government is a part of the State rather than a part from it, for no State could exist without a government. So when we talk of the State in the broadest and most general sense, we should have care to speak of its government, its sovereign and its sovereignty in the same general sense, and thus avoid confounding the various meanings of which the words are susceptible.

Sovereignty, however general the sense in which we regard it, must find an embodiment in some determinate person or institution available for the ordinary purposes of government.[16] "In every political society," says Anson, "there must be some person or body which acts on behalf of the whole, which represents the State as dealing with other States, which represents its collective force and will in maintaining among its own citizens the rules which the Society has made or accepted for the preservation of order and promotion of the public welfare,"[17] but this person or body may be the Sovereign or it may be merely an agent of the Sovereign. The Sovereign may, for one reason or another, be unable to act on behalf of the whole or represent the whole in dealings with other States. We might suppose such a case where an absolute monarch goes insane, or is incapacitated for any other reason, and the administrative function is performed by his ministers, or someone else, in his behalf. Such a situation prevails in this country, where the Sovereign, from its very nature, is unable to perform administrative functions; but the people are none the less sovereign because these functions are exercised by an institution, on behalf and in the name of the people. Mr. McKechnie has nominated this determinate person or institution the *legal sovereign*, to distinguish it from the people, whom he calls the *political* or real sovereign. While this is a convenient distinction to make for purposes of discussion, it is hardly justifiable in theory, and is likely to lead one to conclude that Sovereignty itself is divisible, and that, therefore, within the same State there may be more than one Sovereignty, which is impossible.[18] "Sovereignty," says Mr. Curtis, "is the will of the sovereign people, and government which is a mere servant or trustee can never

[15] Aristotle's Classification.

[16] The State and the Individual, McKechnie, p. 131.

[17] Law and Custom of the Constitution, Anson, Vol. II, Ch. I, p. 1.

[18] "Sovereignty as thus expressing the State's supreme will, is necessarily a unity and indivisible. That there cannot be in the same being two wills, each supreme, is obvious. But though the supreme will of the State may not be divided, it may find expression through several legislative mouthpieces, and the execution of its commands may be delegated to a variety of governmental organs."—The Amer. Constl. System, Willoughby, p. 5.

be sovereign, for it wields delegated powers only. The people might have a hundred governments, each a specified power, without surrendering one atom of sovereignty. Sovereignty being the will of the people, is spiritual and indivisible. It may grant powers for the common good, but the invocation of those powers is of the essence of free will. Accordingly, all that talk of the Jackson-Webster-Madison school of sovereignty, part delegated to the Federal government and part to the State government, is the merest clap-trap ever devised. The error lies in confusing powers, which are capable of division, with sovereignty which is not. Sovereignty means simply a right to govern. Undoubtedly, sovereignty is the will of the sovereign people, and in our American sense all government is derived from that will. But when it is said that government can never be sovereign, there is a begging of the question, for it may be the will of the people that a particular government shall exercise the power of governing."[19]

This particular phase of our argument was prefaced by the statement that government was founded upon the existence of two things, law and a Sovereign: and we found, in developing the idea of law, on the one hand, that we intercepted the domain of government in discussing the Constitution, and now we encroach upon it again by going into the theory of the Sovereign and Sovereignty, all of which goes to prove that they have no separate existence, but are so much a part of each other that it is quite impossible to define one without introducing an element of the other, an ever present condition in the life of any organism.

Mr. Wheaton divides Sovereignty into two classes, internal and external. It is the former we have been considering, "that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what has been called internal public law, *droit public interne,* but which may more properly be termed constitutional law."[20] This completes our discussion of the organization of Society. It remains to consider it from the standpoint of its independence.

II. EXTERNAL DEVELOPMENT OF THE STATE.—Going back to our definition of the State, it will be remembered that it was defined as an independent, organized Society. Proceeding upon the theory of its organization, we have examined its interior structure and growth. Our next consideration shall be of the independent or external aspect of Society.

No Society, however complete its organization, is capable of abso-

[19] Curtis' Constl. Hist. of the U. S., Vol. II, p. 520.

[20] Elements of International Law, Henry Wheaton, 3rd Ed., Sec. 20, p. 32.

lute independence. Every nation finds its conduct regulated, to a certain extent, by a more or less defined system of law. Nature never intended that any one race, society, or community should be entirely self-subsisting any more than an individual. In the life of States there is, in some degree, the same reaching out for what others produce and furnish that is found in the life of the individual. And it is not strange, either: the State is a moral person. It deliberates, takes resolutions in common, has an understanding and a will peculiar to itself, and is therefore susceptible of obligations and laws.[21] In truth, it is an old theory that that State is the most perfect which most nearly interprets the individual in all that it does. Measuring a State by this standard, then, we are driven to conclude that the better a State is, the more its obligations resemble those of individuals. Vattel goes too far in emphasizing the independence of the States, or Nation, over that of the individual. Technically, it is not true that citizens of a State cannot enjoy full and absolute independence, because they have surrendered a part of their privileges to the Sovereign; but that the *State* remains absolutely free and independent with respect to all men, or to foreign nations, when it does not voluntarily submit to them.[22] Unquestionably there is much more latitude in the independence of States than in that of individuals; but this is due, it would seem, to the imperfect individualism of the State rather than to the nature of the State itself. Individualization is to States what civilization is to man. States have always possessed an interior organization, more or less individualistic in its nature; but, in relation to other States, the condition is still one of barbarity. The State is yet to realize that condition under which it may treat with other States, much the same as one man does with another, under a more certain and defined code of law. We are, however, more apt to conclude that the present day condition in this regard is barbaric, when we view it in the light of the possibilities of the future, than when we open a text on international law, where it would seem that all possible contingencies were provided for. The law of the day, however, primitive though it may be, is what we are concerned with in this paper.

I. SOVEREIGNTY.—A State that is sovereign within itself, and it is not within the full import of the word a State unless it is sovereign, [23] is, in a sense, sovereign for all purposes, internationally, as well as constitutionally. Theoretically, there is no difference in

[21] The Law of Nations, M. De Vattel, Sec. 2, p. 1.
[22] The Law of Nations, M. De Vattel, Sec. 4, p. 2.
[23] The Amer. Constl. System, Willoughby, p. 9.

a State's being sovereign for the purpose of dealing with other States and sovereign in respect to itself, but practically the situation is one of considerable difficulty.

States have been classified by Mr. Lawrence as Sovereign States and part Sovereign States.[24] A word now as to the expediency of this classification. Sovereignty, we have said, is the supreme, absolute, uncontrollable power by which any State is governed,[25] which obviously precludes the existence of more than one Sovereign in or over a single State; and a State, on the other hand, is said to include, in an international sense, the whole of an organized and independent society, its territory and every individual under its jurisdiction.[26] How, then, from the standpoint of the law of nations, or international law, can there be such a thing as a part Sovereign State, except of course in the sense that no State is absolutely independent and may be limited, more or less, by its own constitution or by stipulations of unequal treaties?[27] The situation is all the more complicated when we come to consider the constitutional aspect of the State. It is as Mr. McKechnie says, "International law is not entangled in the dispute of party politics, and thus arises more easily above the influences of prejudice. In Constitutional Law, on the other hand, there is unfortunately much danger of definitions being contorted by zealous partisans on one side or the other to support some special theory of internal politics."[28] This is precisely the condition we encounter in talking of a Sovereign, or part Sovereign, State. Usage has made both the word "Sovereign" and "State" susceptible of various meanings, so we are left to inquire into the nature of the thing described in order to ascertain the sense in which the phrase "Sovereign State" is used. The word "State" is used to mean not only the entire community or independent political Society, but is sometimes limited to mean merely the sovereign body in that Society.[29] Again, a State, once having been Sovereign, may continue to be called a State when

[24] Principles of International Law, T. J. Lawrence, Sec. 42, p. 55.

[25] Cooley's Constl. Lim.

[26] The State and the Individual, McKechnie, p. 52.

[27] "The mere fact of dependence, however, does not prevent a State from being regarded in international law as a separate and distinct sovereignty, capable of enjoying the rights and incurring the obligations incident to that condition. Much more importance is attached to the nature and character of its connection with other States and the nature and extent of its dependence. Thus, many European States, which are still regarded as sovereign, do not exercise the right of self-government entirely independent of other States, but have their sovereignty limited and qualified in various degrees, either by the character of the internal constitution or by stipulations of unequal treaties of alliance and protection."—Int. Law, H. W. Halleck, p. 165.

[28] The State and the Individual, McKechnie, p. 53.

[29] The State and the Individual, McKechnie, p. 48.

shorn of its Sovereignty,[30] and under Mr. Butler's theory, that the Sovereignty of the United States passed directly from Great Britain to the people, and that the States were never severally sovereign,[31] we find the word "State" applied to political divisions which never possessed Sovereignty at all. And as to *Sovereignty,* Mr. McKechnie observes that "No term used in political science has given rise to more discussion, or is indeed of such intrinsic difficulty." There are no less than three meanings of the word.[32] It is used in the sense of "our gracious sovereign," meaning the individuals in whose name the government is conducted, and it may mean "the sovereign people," to indicate the Sovereign of last resort, the will of the Sovereign people; and again, as applicable to the English government, "the sovereignty of Parliament," or the legal sovereign, whose prerogative is enforced by law as opposed to that of "the sovereign people" whose sovereignty is enforced by sanction partly moral and partly physical. In this confusion, it is obvious that the words "State" and "Sovereign" standing alone define nothing in particular, so we must take them in the sense in which they are used. Even if we were to arrive at single and definite meanings of the words, it would not necessarily follow that their application would be uniformly correct. There is of course the ideal, the theoretical conception of the State, as there is of Sovereignty, but in this sense the words are of no practical value except that we understand them as relatively, only, to the ideal, as a lesser expression of it. It becomes a matter, then, of judgment to what extent, just how far a body politic must approach the ideal before it can properly be called a State; to what degree a State must be independent abroad, and absolute at home, in order to be rightly called Sovereign. In all these questions, usage and custom must decide.

2. THE LAW OF NATIONS.—Once having given a Sovereign State within the ordinary acceptation of the term, we shall proceed to inquire into the effects of its independence or Sovereignty, the rights it confers and the duties it imposes. First of all the State, no less than the individual, has the right of self-preservation and security. Nature gives every State, as well as every man, the right to suffer no obstruction to its preservation, its happiness and its perfection.[33] This and many other fundamental rights, among which is the right to make treaties, is inherent in States by virtue of their Sovereignty; but to sum up a State's obligations to itself and to

[30] Bliss on Sovereignty, Ch. X, Sec. 9.
[31] The Treaty-Making Power, Butler, Part II, Ch. 5.
[32] The State and the Individual, McKechnie, Ch. IX.
[33] The Law of Nations, Vattel, Book II, Ch. II (pp. 241-249).

other States as well, it may be said "that each should do for others whatever their necessities require, and are capable of doing, without neglecting what they owe to themselves."[34]

"The law of nations,"[35] says Vattel, "is originally no more than the law of nature applied to nations;" but he goes on to say that, owing to the fact that nations are so different in their character from other subjects of the law of nature, very different obligations arise, and it is the art of applying this law to the different subjects, with justice founded on right reason, that renders the law of nations a distinct science.[36]

(a) *The Treaty.*—It is in pursuance of this law, and by virtue of sovereignty,[37] that treaties are made, specifically declaring what the law is or how and by what means it shall be carried into effect. On first thought, it might seem that a treaty, or pact of any kind, between two or more States would be in derogation of the natural law, rather than in conformity to it, since the contracting parties deem it necessary to resort to such formality. This, however, is not the case. A treaty which does not conform to the natural law of nations is void, or at least voidable.[38]

The force of a treaty is that it gives greater reason (legally, not morally) to what States might otherwise do, in that it may bind them to a more certain and definite line of conduct than they would have to pursue under the more general law.

The word for "treaty" in Latin is *tædus,* meaning a pact made by the superior power for the general welfare, to endure for perpetuity or for a considerable time. Pacts as to transitory affairs are called agreements, conventions, or pactions.[39] There are many phases of the treaty that might be indulged in as having an indirect bearing upon our subject, but only those which are most essential are discussed here.

The essentials of a valid treaty are (a) Capacity of the parties to contract, (b) Duly-empowered agents to act on behalf of the States, (c) Freedom of consent, and (d) The object of the contract must be in conformity to law.[40] Of the first essential it may be said that, since every independent State has the power of enter-

[34] The Law of Nations, Vattel, Book II, Ch. II, p. 6.

[35] "A State is distinguishable from a nation or a people since the former may be composed of different races of men all subject to the same supreme authority."—International Law, H. W. Halleck, p. 64.

[36] The Law of Nations, Vattel, Sec. 6, p. 3.

[37] International Law, E. F. Glenn, p. 141.

[38] International Law, E. F. Glenn, p. 140.

[39] International Law, E. F. Glenn, p. 140.

[40] International Law, E. F. Glenn, p. 140.

ing into treaties by virtue of its Sovereignty, the only question which can arise in respect to the capacity of such parties is, "Has the fundamental law of the State, bound by the treaty, been violated?" Of this, contracting States are bound to take notice,[41] and, failing to do so, the treaty is of no binding effect, if in fact such a law has been violated.[42] The treaty-making power of a State is determined by its own constitution, or fundamental law,[43] which may impose certain restrictions upon the method of entering into such agreements.[44] Under Article II., Section 2, of the Constitution, which provides that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators concur, it has been urged that a treaty between the United States and a foreign nation, being a contract, is conclusive against all departments of government, and that foreign nations know only the President and Senate, in the contract, on the part of the United States.[45] To place such a construction upon the treaty-making power would mean that through its exercise a State or any part of its territory could be ceded to a foreign power, notwithstanding the Constitution guarantees every State a republican form of government;[46] commerce might be regulated despite the fact that Congress alone has that power;[47] duties could be imposed upon articles of importation, or they might be admitted free of duty, even though that power is expressly vested in Congress;[48] revenue could be appropriated from the public treasury and withdrawn without any action on the part of Congress.[49] Such an interpretation of the power, far from being American, is not necessary to the proper exercise of it. Where the fundamental law of a State requires auxiliary legislation to give complete effect to a treaty, no obligations arise under it until that legislation has in fact been enacted,[50] and up to the time this final consent of the con-

[41] International Law, E. F. Glenn, p. 140.

[42] This is not in conflict, it will be noticed, with the rule that a treaty becomes operative between the parties from the time it is signed. International Law, Glenn, p. 149.

[43] International Law, Halleck, p. 189.

[44] International Law, Glenn, p. 140.

[45] Const. of U. S., J. R. Tucker, p. 724.

[46] Constitution, Art. IV, Sec. 4.

[47] Constitution, Art. I, Sec. 8, Par. 3.

[48] Constitution, Art. I, Sec. 8, Par. 1.

[49] Constitution, Art. I, Sec. 8, Par. 1. International Law, Halleck, p. 191. "It is true that the executive power is bound to use its utmost endeavors to see that the necessary action is taken on the other branch of the government but the nation as a whole cannot be bound by this agreement, unless their representatives have consented to its terms in accordance with the fundamental law of the State." Again, he says, "It is unquestionably true that a State should not without good cause refuse to ratify a treaty, but this is based upon moral more than upon legal consideration," p. 143, Art. I, Sec. 9, Par. 6.

[50] International Law, Glenn, p. 150.

curring body is obtained the other parties to the contract may withdraw their assent, unless they have done something which would amount to a waiver of the right to withdraw.[51]

The mere fact, however, that the concurrence of Congress may be necessary to carry a treaty into effect, or to turn a *proposed* treaty into a treaty *in fact,* does not mean that Congress can inquire into the terms of the treaty, and so, itself, become the treaty-making power or any part of it.[52] The duty of Congress is to enact appropriate legislation to carry the proposed treaty into effect, unless the fundamental law of the State would be violated by its so doing. The terms of the treaty itself, the effect they would have and the probable consequences of their being enforced, are questions entirely foreign to Congress and cannot be legally indulged in by it. This is not saying, however, that these matters may not have a decided moral effect upon the action of Congress. The terms and object of a proposed treaty, depending upon congressional action to give it effect, are very properly moral considerations, and so they must be regarded. Any broader construction upon the congressional power would virtually make that body a branch of the treaty-making power,[53] a construction that cannot be fairly deduced from the Constitution.

The second essential of a valid treaty, duly-empowered agents to act on behalf of the States, is likewise determined by a State's fundamental law. As to who are agents and to what extent they may bind a State by their acts are matters of which contracting States must take notice. A State is neither bound by one assuming to act in its behalf, who is in fact not empowered to so act, nor by the acts of a duly empowered agent, when he has exceeded his authority. If, however, a State has received material benefits from a contracting State acting in pursuance of a contract illegally entered into, there is a duty upon the State receiving such benefits to make proper compensation and place the injured State in *statu quo* as far as practicable. But no such obligation arises if the acts of the agent were so clearly in excess of his powers that the contracting State should have been aware of the same.[54]

The third essential, freedom of consent, does not mean that a State may not, under any circumstances, be bound by a treaty to which it has been obliged to submit. Treaties of this character, the object of which is the settlement of wars, are held valid, upon the

[51] International Law, Glenn, p. 140.
[52] International Law, Halleck, p. 192.
[53] International Law, Halleck, p. 192.
[54] International Law, Glenn, p. 140.

theory that the complete subjugation of one of the parties is better than the utter exhaustion of both. Where constraint is employed, however, upon a State's sovereign, commander, or any agent of the State authorized to negotiate a treaty, and while under such constraint the terms of a treaty are extorted from him, the freedom of consent, within the meaning of international law, has been denied, and a treaty consummated thereunder is absolutely void.[55]

The fourth and last essential is the object of the contract must be in conformity to law, that is: the end sought must be such as is consistent with international law. A treaty the object of which is the exercise of proprietary rights over the sea would be void, and if it imposes conditions upon a State that are incompatible with its life and growth, it would be at least voidable.

These are the important, general considerations regarding the treaty which concern us in this discussion. But before they can be intelligently discussed in relation to the United States, the fundamental law must be consulted, for it is that, we must remember, which determines the right of a State to make treaties or to be bound by them.

## THE TREATY AND THE AMERICAN STATE

I. WHO IS SOVEREIGN.—Sovereignty, or the right to govern, "is the source of all law,"[56] but only, of course, in a political sense, unless we regard Sovereignty and Nature as the same. When we speak of Sovereignty, we presuppose the existence of the body politic. By reason of Sovereignty the body politic acquires rights, which give rise to corresponding obligations relative to its conduct with other States and itself. The right to make treaties, we have seen, grows out of a State's Sovereignty, howbeit it is exercised in pursuance of the law of nations. But Sovereignty, as the source of *constitutional rights,* we have yet to consider; where it resides, how and by whom it is exercised, and the consequences as bearing upon the making of treaties.

Professor Willoughby has said, and rightly so, that there cannot be any such thing as a State composed of States,[57] meaning that there cannot exist more than one Sovereignty within the same body politic, since Sovereignty is supreme and absolute. The term "Federal State," therefore, he goes on to say, is only correctly employed to designate a State in which a very considerable degree of administrative autonomy is given to the several districts into

[55] International Law, Glenn, pp. 141, 153.
[56] The Amer. Const'l System, Willoughby, p. 33.
[57] The Amer. Const'l System, Willoughby. p. 9.

which the State's territory is divided; and conversely, in all composite political organizations, in which the individual members still retain their sovereignty, no National State is created, and any written articles of union, if such there be, cannot be regarded as a Constitution, but only as an international compact or treaty.[58]

From the very outset of our constitutional history there have been conflicting theories respecting the Federal and the State governments, two distinct schools of thought, and between the extremes stood those who endeavored to compromise conflicting opinions.[59] So it is not surprising that one finds abundant material to support the numerous theories that have been advanced at different times by different writers. In all these controversies, however, the State's Rights advocates have held to a single and consistent theory, maintaining that the Constitution always was, and is, a compact between the several States acting as individual and sovereign entities. In the light of what we have already said, this doctrine would turn the Constitution into a mere compact or treaty, binding the Sovereign States only by the rules of international law.

Opposed to this argument are the numerous theories propounded by the advocates of national supremacy. The position maintained by some is that, admitting that the States were severally sovereign prior to the Constitution, the records of the intentions of its framers co-operate with a reasonable interpretation of its language, in showing that the States intended to and, in fact, did surrender their title to sovereignty.[60] Another explanation is that the moment the colonies threw off the sovereignty of Great Britain they became in their then united capacity a sovereign nation, and that the States as entities were never sovereign.[61] Without attempting to discuss the respective merits of these arguments, it may be said that, in so far as they deny that the revolution transformed the thirteen colonies into thirteen severally sovereign States, they are contrary to the vast weight of evidence.

[58] The American Const'l System, Willoughby, p. 9. Prof. Burgess says, "There is no such thing as a federal state; * * * What is really meant by the phrase is a dual system of government under a common sovereignty." Pol. Sci. and Const'l Law, Vol. I, p. 79.

[59] The Reader, Vol. IX, No. 4. "The Nation *v.* The State," W. J. Bryan.

[60] Commentaries on Const. of U. S., R. Foster, Vol. I, Sec. 15; and also set out by Prof. Willoughby, p. 13. "The continental government which commissioned and sent Washington to take command of the army which it had adopted consisted solely of a body of delegates, chosen to represent the people of the several colonies or states, for certain purposes of national defense, safety, redress, and finally revolution" (Constitutional Hist. of U. S. by Geo. T. Curtis, Vol. I, Ch. 3).

[61] The Treaty-Making Power, Butler, Ch. V, p. 9; Const'l Hist. of the U. S., Von Holst, Vol. I, p. 8.

II. SOVEREIGNTY PRIOR TO THE CONSTITUTION.—A. THE FIRST CONTINENTAL CONGRESS.—The relation existing between the mother country and the colonies before the revolution, whether their allegiance was as separate entities, is still a matter of dispute, as is also the exact time that the colonies threw off the British yoke. These troublesome questions will always be open to discussion, for the colonies were in an actual state of rebellion long before July 4, 1776.[62] But the earliest time claimed for the existence of a national State is the assembling of the First Continental Congress.[63] To ascertain the nature of this Congress and the extent of its powers, let us inquire into the manner of its creation and the instructions of the delegates who composed it. Delegates from two colonies were chosen by the legislatures. The Massachusetts delegates were chosen by the lower house, and Georgia was not represented. In only six colonies were there held special conventions for the choosing of delegates.[64] These facts, it would seem, do not comport with Justice Story's idea of this Congress being "the people, acting directly in their primary, sovereign capacity, and without the intervention of the functionaries to whom the ordinary powers of government were delegated."[65] A glance now into the instructions of these delegates. "Four delegations," says Professor Van Tyne, "were instructed to procure the harmony and union of the empire, to restore mutual confidence or to establish the union with Great Britain. Three were instructed to repair the breach made in American rights, to preserve American liberty, or to accomplish some similar end. Two were to get a repeal of the obnoxious acts, or determine on prudent or lawful means of redress. Three were simply to attend Congress or 'to consult to advance the good of the colonies.' North Carolina alone bound her inhabitants in honor to obey the acts of the Congress to which she was sending delegates. When the Congress met it restricted its proceedings absolutely to statements of the grievances and appeals for relief. The delegates in no way went beyond their instructions, as a careful examination of the journal will show. Conservative feelings ruled, and the restoration of union and harmony with Great Britain was the prevalent desire. It is manifestly wrong, therefore, to look at the First Continental Congress as coming together because of a national feeling, because of a desire to form a national State, and therefore to ascribe to it governmental powers. It was called because a joint

[62] The Treaty-Making Power, Butler, Ch. V, p. 3.
[63] Amer. Historical Review, Vol. XII, No. 3, p. 529, C. H. Van Tyne.
[64] Amer. Historical Review, Vol. XII, No. 3, p. 529.
[65] Story's Commentaries, p. 140.

appeal would naturally be more effective than any simple petition. The colonies sending delegates to the First Continental Congress no more coalesced into a national State by that act than did the colonies which sent delegates to the Albany Congress or the Stamp Act Congress."[66] And this seems to be the sound view.

B. THE SECOND CONTINENTAL CONGRESS.—Of the Second Continental Congress which met the year following, three of the delegations were chosen by the legislatures, three by the lower houses of the legislatures alone, and seven by provincial congresses or conventions. Three of these delegations were to merely represent, or attend, meet and report; two were to join, consult and advise; six were to concert and agree or determine upon, while Georgia instructed her delegates "To do, transact, join and concur with the several delegates." Maryland and North Carolina bound the people of the State to abide by the action of Congress at first, and similar measures were taken by Georgia and New Jersey later. Eight of the colonies forwarded new instructions to their delegates before January of the following year (1776), but only two changed the charter of their instructions.[67]

Of this Congress Justice Story says: "The Congress of 1775 accordingly assumed the exercise of some of the highest functions of sovereignty,"[68] and true it did, but it is important that while these very functions were being exercised, Congress was repeatedly voting for reconciliation, assuring the King that they were not raising their army for the purpose of separation, but wished harmony to be restored. And until as late as October, 1775, reconciliation was the common sentiment.[69] The colonies in the very taking of arms expressed their loyalty to Great Britain and hope of reconciliation, which was not necessarily inconsistent. But "the idea of loyalty to the British King and a co-existent desire for an American national State *are* incompatible, therefore if Congress was doing seemingly sovereign acts, it was merely in the capacity of a party committee leading a rebellious faction in the empire in an attempt to force the concession of its rights."[70] The time came, however, when the bonds of loyalty were broken, but what transpired at that time could not well be construed as creating a consolidated independent State. In fact, it was declared in debating the resolution "that if the delegates of any particular colony had no power to declare such colony inde-

[66] Amer. Hist. Review, Vol. XII, No. 3, p. 530.
[67] Amer. Hist. Review, Vol. XII, No. 3, p. 531.
[68] Story's Commentaries, Vol. I, p. 157.
[69] Amer. Hist. Review, Vol. XII, No. 3, p. 533.
[70] Amer. Hist. Review, Vol. XII, No. 3, p. 534.

pendent, certain they with the others could not declare it for them, the colonies being as yet perfectly independent from each other."[71]

(a) *The Declaration.*—The action taken upon the Declaration in the State conventions and legislatures shows clearly that their assent was given as separate, independent States. In Pennsylvania the convention declared that "before God and the world that we will support and maintain the freedom and independence of this and the other United States of America," and Connecticut assembly resolved "that this Colony is and of right ought to be a free and independent State." But what the States may have thought they were doing is better shown by what they in fact did than by any language. South Carolina expressly gave its government the power of making war, concluding peace, entering into treaties, lay embargoes, and provide an army and navy, and Virginia, acting under implied power, ratified the treaty with France, and by law established a clerkship of foreign correspondence.[72] In the face of these facts it is difficult to see how the Congress can be other than John Adams describes it, "not a legislative assembly, nor a representative assembly, but only a diplomatic assembly."[73]

No doubt but that there was a national consciousness, the language, history, manners and laws would tend to give rise to such a feeling, but until a national State in fact came into being, we cannot properly speak of its Sovereignty.

C. THE ARTICLES OF CONFEDERATION.—The next event that concerns us, in this connection, is the adopting of the Articles, a step further toward a national unity, though an insufficient one. At the same time independence was declared a committee was appointed to draft a written Constitution, which was submitted to Congress in the autumn of 1777, but was not ratified by all the colonies until 1781. The position of the colonies is here set forth in no equivocal language. Article II expressly provides that "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled." The use of the phrase, "retains its sovereignty," etc., is significant in showing a complete recognition of State sovereignty. Article III reads, "the said States hereby severally enter into a firm league of friendship with each other," etc., which clearly indicates the nature of the relation created by the Articles. It must be conceded, then, that up

[71] Amer. Hist. Review, Vol. XII, No. 3. Note by Wilson, Livingstone, etc., Jour. of Congress, 1088, in Article by Van Tyne.

[72] Amer. Hist. Review, Vol XII, No. 3, pp. 539-540.

[73] Amer. Hist. Review, Vol. XII, No. 3, p. 542 and Civil Government in the U. S. John Fiske, p. 212.

until the adoption of the Constitution, at least, the States were severally sovereign.

III. THE CONSTITUTION.—A. VIEWS REGARDING IT.—Now the Constitution brought forward what had been a growing tendency from the very first—a national State, capable of exercising sovereign powers. But the Constitution was generally regarded at the time of its adoption and for some time after its ratification as a compact between States. Madison says: "This assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State,—the authority of the people themselves. The act, therefore, establishing the Constitution will not be a national but a Federal act."[74] And this was the accepted opinion of the day. The people thought they were establishing a central government which was to act as an agent of the severally sovereign States united in a supposed league or confederation, but a National State, under which no right was reserved by the States of either nullification, or secession, a logical as well as practical impossibility. Such, however, was the situation.

It seemed plausible that a sovereign State could be created from sovereign States, each surrendering certain of its rights, much in the same way a State may be formed of individuals, each sovereign within the sphere of his own person, yet obligated in other respects to a superior power. The Virginia convention called to vote upon the proposed Constitution was characterized by heated arguments both for and against its adoption. Patrick Henry opposed its ratification, for the new plan, he said, was indisputably a consolidated government and not a confederacy. The preamble, "We the People," not "We the States," he said, would admit of no other interpretation. If the States were not the parties to this new compact then it must be national in its character. And he could not see the need of such a radical change that would so endanger the public peace and safety.[75]

In answer to this objection Madison described the new government as having a dual character. In respect to some things it would be Federal and in others consolidated. The parties to it were the people, not as a mass, but as the people of the States severally. The assent merely of the majority of the people would be sufficient to establish a purely National State, but by the people adopting it as

[74] Federalist No. 39.

[75] Curtis' Const'l Hist. of the U. S., Vol. I, p. 664.

members of the severally sovereign States the act was that of the States.[76]

Here is the objection and the argument by which it was met, showing full well that it was thought a legally indissoluble Union could be created by an agreement between sovereign States,—"one," as Mr. Willoughby says, "in which not simply the exercise of sovereignty but the power itself should be divided between the National State and its member Commonwealths."[77] The people thought they were creating a State National in its character and at the same time believed the sovereignty of the several Commonwealths was not sacrificed. Then what of the result?

B. SUBSEQUENT INTERPRETATION.—No sooner had the Constitution been adopted than it began to receive a liberal interpretation, which, as we have seen, is both consistent and necessary with written Constitutions. The establishment of the National Bank in 1791 and granting appellate jurisdiction were the first infringements upon State sovereignty, and they were both strenuously objected to as an undue exercise of National power. The illogical situation under the Constitution, the existence of sovereign States within a State itself sovereign, gradually became apparent, and, although the rights of the States were vigorously defended, the general tendency was toward centralization.

To this was added a decision of the Supreme Court in 1793 (*Chisholm* v. *Georgia*, 2 Dall. 419), in which the State of Georgia was sued by a citizen of South Carolina, the State defending upon the ground that it was a sovereign State and therefore could not be sued without its own consent. In his opinion, Mr. Justice WILSON said that "the citizens of Georgia, when they acted upon the large scale of the Union as a part of the 'People of the United States,' did not surrender the supreme or sovereign power to that State (that is, to the State of Georgia), but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is not a sovereign State." In the same case Mr. Chief Justice JAY, in delivering his opinion, said, "The Revolution, or rather the Declaration of Independence, found the people already united for general purposes and at the same time providing for domestic concerns by State conventions and other temporary arrangements. From the crown of Great Britain the sovereignty of their country passed to the people of it * * * afterwards, in the hurry of the war, and in the warmth of mutual confidence they made a confederation of the States; the basis of a

[76] Curtis' Const'l Hist. of the U. S., Vol. I, p. 667.

[77] The Amer. Const'l System, Willoughby, p. 30.

general government. Experience disappointed the expectations they had formed of it, and then the people, in their collective and national capacity, established the present Constitution. * * * Every State Constitution is a compact, made by and between the citizens of a State to govern themselves in a certain manner, and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects, in a certain manner." It was ordered that judgment would be taken against the State by default unless it appeared or showed cause to the contrary. Georgia declared that she would not be bound by the decision and threatened death to any person who should come within her borders attempting to execute the mandate of the court. And actual rebellion was prevented only by an amendment (amendments, Art. XI) to the Constitution declaring that the judicial power of the United States should not be construed to extend to any suit commenced or prosecuted against one of the United States by citizens of another State. Clearly the national government was not the loser, when it took an amendment to abridge its power.

In *Ware* v. *Hylton* (3 Dall. 236), decided in 1796, Mr. Justice CHASE sets out the strongest opinion favoring the unlimited extent of the treaty-making power upon record. But this case will be discussed in a subsequent section of this paper.

This was followed in 1803 by the case of *Marbury* v. *Madison* (1 Cranch 137), in which an act of Congress was for the first time declared unconstitutional. The effect of this decision was not alone to establish the authority of the Federal judiciary over the Federal legislature, but it indicated with no uncertainty that the power to finally determine the constitutionality of Federal law was in the Supreme Court of the United States and not the States.

The following year, 1804, Mr. Chief Justice MARSHALL, in *The United States* v. *Fisher* (2 Cranch 358), said, "In construing this clause (Const., Art. I, Sec. 8, Par. 9) it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said, with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must posssess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution,"—a positive assertion that Congress is not bound, under the

elastic clause in the Constitution, to pass only such measures as are *indispensable* to the exercise of its express power, and, further, that Congress, itself, has the choice of means it shall employ in carrying such express power into effect.

In 1809, just five years later, *The United States* v. *Peters* (5 Cranch 115), was decided. The facts briefly stated were these: In 1777 an admiralty court of Pennsylvania condemned and sold, as a prize, a fishing vessel. The State marshal had been forbidden to pay over the proceeds to the State Court, upon an appeal to the Committee of Appeals of the Continental Congress; the money, notwithstanding, was paid over to the State officials and found its way into the State's treasury. Suit was brought in 1803, in the District Court, to recover this money from the estate of the treasurer, who was then deceased, and judgment was rendered in favor of the plaintiff. The Pennsylvania legislature then passed an act denying the authority of the Federal Court and authorizing the State's executive to prevent the execution of the Federal decree by force, if necessary. Efforts to obtain a settlement were unavailing, and finally the United States Supreme Court was asked for a mandamus to compel the district judge to enforce the judgment. In his opinion Mr. Chief Justice MARSHALL said: "If the legislatures of the several States may, at will, annul the judgment of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals," and after assigning the reasons he concludes that "the State of Pennsylvania can possess no constitutional right to resist the legal processes which may be directed in this cause. * * * A peremptory mandamus must be awarded."

The district judge issued a writ of attachment in obedience to this order, but in attempting to serve it the marshal found the deceased's residence surrounded by the State militia, which was acting under orders of the Governor, in pursuance of the act of the legislature. The marshal then summoned a posse comitatus, in all about two thousand men. As a result of this action the Governor of Pennsylvania appealed to the President of the United States to prevent the execution of the judgment, which, it was claimed, was founded upon a pure usurpation of power; but Madison refused to interfere, and the money was paid over. Afterwards the National Government indicted and secured the conviction of the general of the Pennsylvania militia and the men who had participated in resisting the writ.

In *Fletcher* v. *Peck* (6 Cranch 87), decided in 1810, Mr. Chief Justice MARSHALL, rendering the opinion, held a State law, impairing the obligation of a contract, to be unconstitutional and void.

Following this decision in 1816 came the case of *Martin* v. *Hunter's Lessee* (1 Wheat. 304), in which the State of Virginia attempted to prevent the decisions of her highest court, the Virginia Court of Appeals, being reviewed by the Supreme Court of the United States, when they were adverse to Federal authority. In the opinion, prepared by Mr. Justice STORY, it was said, "The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and, if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power,"—another assertion of National sovereignty.

The famous case of *McCulloch* v. *Maryland* (4 Wheat. 316) was next decided in 1819. While it did not determine any absolutely new constitutional principles, the opinion, rendered by Mr. Chief Justice MARSHALL, is a splendid reassertion of the doctrine of implied powers set forth by him fifteen years before in *The United States* v. *Fisher,* supra, and that a state may not interfere with the execution of Federal law, decided in *The United States* v. *Peters,* supra. A portion of the opinion is as follows: "In discussing this question the counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign, and must be exercised in subordination to the States, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the Constitution was, indeed, elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might be submitted to a convention of delegates, chosen in each State, by the people thereof, under the recommendation of its legislature, for their assent and ratification. This mode of proceeding was adopted, and by the convention, by Congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely on such a subject, by assembling in

convention. It is true they assembled in their several States, and where else could they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.[78] Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments. From these conventions the Constitution derives its whole authority. * * * The assent of the States in their sovereign capacity is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived by the State governments. The Constitution when thus adopted was of complete obligation, and bound the State sovereignties."

MARSHALL again asserted the sovereignty of the National Government in *Cohens* v. *Virginia* (6 Wheat. 264), decided in 1821. "If it could be doubted," he said, "whether from its nature it [the National Government] were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that 'this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.' This is the authoritative language of the American people, and, if the gentlemen please, of the American States. * * * The people can make the Constitution and the people can unmake it. * * * But this supreme and irresistible power to make or to unmake resides only in the whole body of the people, not in any subdivision of them."

C. SUMMARY AND EFFECT OF THESE DECISIONS.—Let us stop here and condense these decisions into a few general propositions that will be available for our discussion of the treaty. First, as to general matters affecting foreign affairs or territory held in common, the United States is a Nation and is sovereign. Second, the National Government is supreme in all cases where it is empowered to act. Third, Congress is the judge of the means by which its express powers shall be given effect. And, Fourth, the power to determine the constitutionality of Federal law is in the Supreme Court of the United States. These would seem, in substance, to be

[78] The Reader, Vol. IX, No. 4. "The Nation *v.* States' Rights;" Article by A. J. Beveridge. Mr. Beveridge's theory undoubtedly represents the tendency of the times.

the fundamental results of the first thirty years of Federal adjudication. The decisions of this period and for several years after were strongly national in character, due largely to the dominating influence of Mr. Chief Justice JOHN MARSHALL. But, whatever the cause or the theory back of them may be, these decisions stand as a recognized part of our fundamental law. All may not agree that they are sound, but *none* can deny that they are law.

IV. NATIONAL SUPREMACY.—Before we enter upon a discussion of the relative rights of the Federal Government and the State governments, let us avoid a confused idea of what we mean by "Government." Primarily of course, as we have seen, Government is no creation of man; but, generally, it is intended to mean the particular form of government, including all the various branches of legislative, executive and judicial machinery by which a State is managed. And it is in this sense that we shall use the word throughout the remainder of this paper.

In this country the people are the sovereign, because sovereignty, the right to govern, resides in them.[79] But in every political society there must be some determinate person or institution available for the ordinary purposes of government,[80] some person or body which acts on behalf of the whole.[81] Obviously the people of the United States, as the sovereign, could not perform the administrative functions of government; but it is not beyond their power to delegate the exercise of their sovereignty to institutions available for administrative purposes. And this they in fact did, but by so doing they parted with *none* of their sovereignty whatever. The *exercise* of it is all that was delegated, and for this reason, the right to the exercise of it may be recalled at any time.

We have already seen that two sovereignties cannot exist within the same body politic, and it is equally true that within the same body politic two agents cannot exercise sovereignty on behalf of the sovereign, in respect to the same things. In case of conflict, then, between two agents, apparently duly empowered by the same sovereign to exercise sovereignty, how are we to determine, in a particular case, which shall prevail? This is precisely what we must decide, should the general government make a treaty with a foreign State in derogation of an alleged State right.

But it may be objected that the two agents, the National government and the State governments, were or are not empowered to act by the same sovereign, that the National government received

[79] Chisholm Ex'r *v.* Georgia, 2 Dall. 472.

[80] The State and the Individual, McKechnie, p. 131.

[81] Law and Custom of the Const., Anson, Vol. II, Ch. I, p. 1.

its sanction from the whole people and the State governments from the people of the several States. Still we maintain that there can be but one "supreme, absolute, uncontrollable power in any State," and that, in this country, that power resides in the people as a whole.

However sovereign may have been the powers which the States severally exercised prior to the adoption of the Constitution, the construction placed upon that instrument by the Supreme Court of the United States is conclusive against any assertion of State sovereignty. It is an expression of the will of the people. There is no express language in any of the decisions directly to the effect that the States are not sovereign; but what is the inevitable result with a *general* government, supreme in all cases where it is empowered to act, with a Congress that is the judge of the manner in which its powers shall be made effective, and a Judiciary that alone has the power to determine the constitutionality of the general law? Have we not, after all, a "State in which a very considerable degree of administrative autonomy is given to the several districts into which the State's territory is divided," and not a State composed of States? This would seem to be the logical conclusion, and one borne out by fact as well. The tendency toward centralization has not been one of steady growth. It has received many blows, and has been the subject of many disputes, but has almost invariably emerged the winner.[82] It is said that during the revolution a man was quicker to remember that he was a New Yorker or Virginian than that he was a citizen of the United States,—how different today. Mr. Bryce, in speaking of State government, says: "The State set out as an isolated and self sufficing commonwealth. It is now merely a part of the grander whole, which seems to be slowly absorbing its functions and stunting its growth, as the great tree stunts the shrubs over which its spreading boughs have begun to cast their shade. * * * The truth is that the State has shrivelled up. It retains its old legal powers over the citizens, its old legal rights as against the central government. But it does not interest its citizens as it once did. Men do not now say, like Ames, in 1782, that their State is their country."[83] True as this condition of affairs is, it is not, strictly speaking, within the province of the constitutional lawyer. His business is to interpret the law, in the light of reason and justice, as he finds it in the Constitution and upon the statute books. Surrounding influences will get in their work in time.

[82] Mr. Edmund James, Pres. of the University of Illinois, in a speech at the Jamestown exposition, September 16, 1907, declared that we need a new constitution, that our present one is necessarily distorted and violated to meet the exigencies of the day. Indianapolis News, dated September 16, 1907.

[83] The American Commonwealth, abridged ed., James Bryce, p. 386.

V. THE TREATY-MAKING POWER.—A. THE FIRST EXERCISE OF THE POWER.—The treaty-making power was first exercised by the United States on February 6th, 1778, when Benjamin Franklin, Silas Dean and Arthur Lee, commissioners representing the thirteen United States of America, concluded two treaties with France, one of amity and commerce,[84] and the other of alliance,[85] both of which were ratified by the Continental Congress, May 4, 1774. Both of these treaties recited "the most Christian King and the United States of North America, to-wit:" (setting out the original thirteen States by their names). From this wording it is very evident that the States were regarded as, and contracted in, the sphere of independent sovereignities.

B. UNDER THE ARTICLES.—Under the Articles of Confederation treaties were made by commissioners appointed by Congress with Great Britain, France, Netherlands, Sweden and Morocco. And these treaties were all contracted in the name of the United States of America, showing a recognition, on the part of the *contracting powers,* of a National Sovereignty: howbeit the domestic situation at the time was, as we have seen, insufficient to justify it.

C. UNDER THE CONSTITUTION.—Under the Constitution there are just three paragraphs that concern us relative to the treaty, Art. VI, Par. 2, which make the Constitution, and all laws of the United States passed in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, the supreme law of the land; Art. II, Sec. II, Par. 2, giving the President power, with and by the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators concur; and Art. I, Sec. X, Par. 2, providing "No State shall enter into any treaty, alliance, or confederation," etc. Can the exercise of the treaty power, as here set forth, operate so as to deny a State a right which it derives expressly or impliedly from the Constitution? There is no case directly deciding the issue, and courts have generally been reluctant in expressing themselves upon it. Meeting the proposition squarely, it is the opinion of the writer that the question cannot be answered positively, one way or the other. But let us examine a few fragments of dicta and opinions of commentators upon the subject, in view of formulating a rule that would seem consistent with law and reasonable in its operation.

The strongest opinion in favor of the unlimited extent of the treaty-making power is that of Mr. Justice CHASE in *Ware* v. *Hylton* (3 Dall. 236), decided in 1796. In rendering the opinion

[84] U. S. Treaties and Conventions, p. 296.
[85] U. S. Treaties and Conventions, p. 307.

he says, "There can be no limitation on the power of the people of the United States. * * * It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State; and their will alone is to decide."

It has been repeatedly held that any treaty made "under the authority of the United States" is "the supreme law of the land," and that the "judges in every State" are "bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Cases in support of this contention are those in which it has been held that State laws which interfere with the rights of aliens to hold and transmit real property are null and void when such rights have been granted by treaty.[86] But this does not seriously invade the police power or the reserved rights of the States, for a comparatively small amount of property is affected by these cases. Besides, privileges of this nature are very often the subject of negotiation, and the Federal government would be sorely embarrassed by a lack of power to grant them.

Judge COOLEY says, "A State must yield to the supreme law whether expressed in the Constitution of the United States or in any of its laws or treaties."[87] But in *Ware* v. *Hylton* (3 Dall. 199) and *Society* v. *New Haven* (8 Wheat. 464) it was held that a treaty is supreme only when made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to subjects over which it has jurisdiction.

In *Geoffrey* v. *Riggs* (133 U. S. 258) Mr. Justice FIELD did not believe that the treaty-making power of the United States was such as to "authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States."

"The Supreme Court has," Mr. Butler tells us (Vol. II, p. 56) "in regard to treaties, as it has in regard to Federal statutes, ever kept in view the exclusive right of States to regulate their internal affairs, and has not allowed either treaty stipulations or Federal statutes to be so construed as to prevent the proper exercise of police powers."

*People* v. *Gallagher* (93 N. Y. 447) held that "the privilege of receiving an education at the expense of the State, being created and conferred solely by the laws of the State, and always subject to its discretionary regulation, might be granted or refused to any individual or class at the pleasure of the State." This doctrine is

[86] Chirac *v.* Chirac, 2 Wheat. 259; Canuael *v.* Banks, 10 Wheat. 181; Hauenstein *v.* Lynham, 100 U. S. 483.

[87] Cooley's Const. Limitations, 6 ed., pp. 18-19.

supported also by *Garnes* v. *McCann* (21 Ohio St. 198) and *Cary* v. *Carter* (48 Ind. 327).

In the *License Cases* of 1847 (5 How. 613) Mr. Justice DANIEL went to the extent of holding that "treaties, to be valid, must be made within the scope of powers vested by the Constitution; for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away one right of a State to any citizen of a State."

STORY has said that "The language of the Constitution of the United States, which gives the character of 'supreme law' to a treaty, confines it to 'treaties made under the authority of the United States.' That authority is limited and defined by the Constitution itself. The United States has no unlimited, but only delegated, authority. The power to make treaties is bound by the same limits which are prescribed for the authority delegated to the United States by the Constitution. To suppose that a power to make treaties with foreign nations is unlimited by the restraints imposed on the power delegated to the United States would be to assume that by such treaty the Constitution itself might be abrogated and the liberty of the people secured thereby destroyed. The power to contract must be commensurate with and not transcend the powers by virtue of which the United States and their government exist and act. It cannot contract with a foreign nation to do what is unauthorized or forbidden by the Constitution to be done. The power to contract is limited by the power to do."[88] And STORY, it will be remembered, was strongly national in his feelings.

VI. CONCLUSION.—The courts generally are loath to embarrass the Federal government in its exercise of the treaty-making power, and the government has been careful to keep within its recognized powers. The Department of State in 1899 refused an offer on the part of the British government to negotiate a treaty to prevent discriminatory legislation by the States, subjecting foreign insurance companies to higher taxes than domestic companies, on the theory that the people of the United States objected to having their self government interfered with.[89] Thus we see there are limits which, whether recognized as a mere matter of expedience or as law absolutely binding, have been observed.

Now are the limits suggested herein fixed pillars in our law

[88] 3 Story, Com. on Const., § 1501.

[89] Amer. Pol. Sci. Rev., Vol. I, No. 3. "The Japanese School Question," Ames S. Hershey.

that must stand on down through the centuries as immovable monuments to the rights of States, determining their status and fixing upon the Federal government, forever, an obligation to act in accordance therewith? Obviously not. Such a conclusion would be as extreme as that the power of making treaties is absolutely unlimited in the extent of its application. We are a Nation living under the same flag, protected by the same law, the benefits of which we cannot partake without being subject to whatever inconvenience or sacrifice it may occasion. To the world at large we put up a single front, the United States of America,—a Nation,—not forty-seven, nor thirteen, independent Sovereignties. Under our existence as a Nation we partake of international relations that would be beyond us as disintegrated States: we enjoy a National prestige equal to that of any other power on earth: our interests are secure against foreign invasion, and, because we are a Nation among Nations, a Sovereign Nation as much as any other power. Our interests are becoming more complex, and our obligations to other peoples greater as we indulge in their society and enjoy intercourse with them. A prediction of the future, in the light of the present tendency, would be indicative of a continually increasing intimacy, greater rights and more binding obligations. But, without regard to the future, is it reasonable to suppose that the people of any particular State, who are as much a part of the Nation as any other aggregate of individuals living within its borders and amenable to its laws, have the right to deny the obligations that may descend upon them, through privileges which they enjoy? Admitting that it would be reasonable, should the interests of the whole people be jeopardized by the holding out of a few? These, and many other questions that might be asked, could be answered as mere moral considerations. Upon the theory, also, that our so-called "Federal State" is used merely to designate a single State,—the Nation,—in which the several States are but administrative units for the whole, it is clear, also, that a State could have no real rights, capable of being enforced, as against the authority of the Nation, and *theoretically* this is precisely the situation, though in practice it has been so modified as to give rise to a question of its truth in theory. Fortunately there is enough agitation of the State's Rights doctrines to keep us from getting lost in a mad Nationality. So intense are the centralizing forces that it is not unfair to presume that with no retarding element in our National life we would soon reach our goal and inevitably begin to decline. The assertion of the two schools induces conservatism and constraint,—the greatest element in the longevity of the State as well as the individual.

So we cannot disregard the forces in our life that are so vital to the concern of all, those that retard radicalism and conduce deliberation and reason in the administration of our affairs.

It would seem that, with any regard whatever for these considerations, it cannot be said that the power to make treaties is unlimied. No unlimited power exists. The only question is, where are its limits? For an answer we must first look to the Constitution, and this we must next interpret in the light of International law, for it would be as much folly for a people to deny obligations, which the law of Nations imposes upon them, because their own Constitution says they were not bound thereby, as to claim a right over other Nations because their Constitution says they have such a right.

We have said that a State's right to make treaties is determined by its fundamental law, and generally this is true, except under some circumstances when the treaty is made in settlement of war; but disputes as to what the fundamental law of a State may be are by no means improbable—a contingency against which we should provide in construing the power to make treaties.

In *Whitney* v. *Robertson* (124 U. S. 190) Mr. Justice FIELD said: "By the Constitution a treaty is so placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other." This, it would seem, is the true rule, so far as the Constitution is concerned, but it does not provide for a contingency such as we are supposing in this discussion.

Before attempting to lay down any general rule, let us see whether or not it could be enforced, granting that there be one.

In *Foster* v. *Neilson* (2 Pet. 314) it was held that when the terms of a stipulation import a contract, a treaty addresses itself to the political and not the judicial department, and Congress must execute it before it becomes a rule of court. Where, then, Congressional action is not essential to the operation of the treaty, it is not a subject over which the Supreme Court can entertain jurisdiction.

In *Fellows* v. *Blacksmith* (19 How. 366) the rule was laid down that after a treaty has been executed and ratified, courts cannot go behind it for the purpose of annulling its operation.

These, however, are not assertions that a State is not judicially entitled to relief when its recognized Constitutional rights are without reason flagrantly impaired and violated by the operation of a treaty. And it appears, to the writer, that there is no valid reason why a State, upon proper application to the Supreme Court of the United States, is not entitled to a hearing upon an alleged violation of its Constitutional rights, irrespective of whether the invasion is

due to the operation of a treaty, or any other cause.[90] Granting the jurisdiction, the remedy and means of securing its enforcement would follow.

My conclusion is that the question is one that calls, merely, for the application of equitable principles, the nature of the right alleged to have been invaded, the extent to which it is abridged, the good faith and prudence upon the part of the Federal government, are all proper matters to come before the Supreme Court of the United States in determining whether or not the treaty-making power has in fact been misused, exercised in a manner and for a purpose that is both unusual and oppressive, eminently dangerous to the existence and the welfare of the Nation. CHARLES SUMNER CLANCY.

INDIANAPOLIS.

[90] Constitution, Art. III, Sec. 2.